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In The

Supreme Court of the United States

WILLIAM COZZI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment Self-incrimination Clause's total prohibition on the use and derivative use of immunized statements is violated when compelled statements extracted by state investigators are used in focusing a federal prosecution on the declarant.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Cozzi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 613 F.3d 725. Pet. App. 1-21.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . "

STATEMENT

Petitioner, while a Chicago Police Department officer, struck a drunken and unruly arrestee who was then strapped to a wheelchair in a hospital emergency room. Shortly after the incident, the police department's internal affairs division commenced an investigation, which included questioning petitioner under compulsion of job loss, on three occasions. Petitioner was later held to answer in employment-discharge proceedings, and was charged with criminal offenses in state court.

Some time following the resolution of petitioner's state criminal case and administrative employment-discharge proceedings, the media questioned the incoming head of the Chicago Police Department, an FBI agent, about petitioner's case. The soon-to-be police department head thereafter reviewed petitioner's compelled statements and urged the federal government to initiate a civil rights prosecution. The federal government did so. Petitioner objected that his compelled statements had been derivatively used to focus the federal investigation and prosecution on him. The lower courts, however, blessed the use of petitioner's compelled statements on grounds that "tangential use" of the compelled statements does not violate the Fifth Amendment Self-Incrimination Clause. Not all circuits, however, follow this approach. A competing line of cases has literally interpreted this Court's total prohibition on the use of immunized statements as stated in *Kastigar v. United States*, 406 U.S. 441 (1972), and reaffirmed in *United*

States v. Hubbell, 530 U.S. 27 (2000). This case provides this Court with an opportunity to resolve the dispute that has long been percolating in the lower courts.

1. The facts are not in dispute. On August 2, 2005, Randle Miles suffered stab wounds during a disturbance with a prostitute on a street in Chicago, Illinois. R. 23, 71. Ambulance personnel encountered Miles in an inebriated condition, and transported him to Norwegian American Hospital. *Id.* Petitioner, a decorated Chicago Police Department police officer, eventually arrived at the hospital. *Id.* He found Miles, who had been placed in a wheelchair by security guards, causing a commotion. Miles "tried to hit a nurse and threatened to kill everyone." R. 71.

Petitioner placed Miles under arrest. Petitioner handcuffed and shackled Miles to the wheelchair. Thereafter, petitioner repeatedly struck Miles with a non-police-issued sap. R. 64. Persons present in the hospital's emergency room witnessed the incident, and security cameras captured it on videotape. R. 48, 72. Police reports prepared by petitioner stated that petitioner had used an open-hand to strike Miles, and did not disclose the use of the sap. R. 64.

2. On August 25, 2005, the hospital contacted the Chicago Police Department's Office of Professional Standards ("OPS"), which commenced an investigation the next day. R. 48. As part of the investigation, OPS investigators interviewed petitioner on September 14, 20, and 21, 2005. R. 23, 71.

Pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967), and Illinois law, 65 ILCS 5/10-1-18.1, petitioner was given administrative rights, instructing that he was compelled to make statements or else lose his job, but that anything he said could not be used against him in any future criminal proceeding. R. 23. On October 27, 2005, the OPS released a summary report concluding that petitioner should be terminated from the police department. R. 48.

In December 2005, a state grand jury returned an indictment charging petitioner with felony offenses. R. 23; R. 71. Petitioner reached a plea agreement with state prosecutors. In May 2007, petitioner pled guilty to a reduced (misdemeanor) battery charge. The state judge concurred in the agreement, and sentenced petitioner to 18 months probation with the condition that he complete anger management classes. R. 23, 48, 71. Petitioner satisfactorily completed the probation term.

In April 2006, the superintendent of the Chicago Police Department filed administrative charges seeking to separate petitioner from the police department. The Chicago Police Board ("police board"), the body that presides over serious employment discharge proceedings against police officers, held public hearings in relation to the administrative charges. The superintendent called petitioner as an adverse witness on two occasions. The superintendent's counsel asked petitioner a series of questions about his compelled statements to the OPS. R. 23, 48. On October 18, 2007, the police board issued a 6-2

decision refusing to discharge petitioner, and retroactively suspending him for two years.[1] R. 23, 48, 71.

3. The *Chicago Sun Times* newspaper obtained the hospital surveillance videotape through a Freedom of Information request. Petitioner's case became a political issue in the 2008 primary race for the Cook County State's Attorney position. R. 23. In addition, an FBI agent named Jody Weis was scheduled to become the superintendent of the Chicago Police Department effective February 1, 2008. The media questioned Weis about petitioner in January 2008. Weis denounced petitioner, expressed unhappiness with the police board's decision and promised to take a "hard, close look" at the matter. R. 23, 48. Weis ultimately vowed that petitioner would not return to the police force. R. 23, 71.

Weis thereafter sent emails about petitioner to a supervisory FBI agent on January 16 and 21, 2008. Weis attached a video-clip of the incident to one of the emails; asked whether the FBI had initiated a civil rights investigation of petitioner; noted that the prior superintendent had been unsuccessful in getting

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[1] The City appealed the police board decision. On July 11, 2008, a state chancery division judge released a written opinion affirming the police board. The court noted that while perceived public opinion may have motivated the Superintendent to seek petitioner's discharge, public opinion was not the sole standard in determining whether the police board's decision should be reversed. The chancery judge determined that the police board had properly balanced the admitted wrongdoing against petitioner's record of performance as a police officer. R. 71.

petitioner terminated from the police department; and stated that petitioner had "falsified his statement." R. 41. The FBI had not previously looked into the incident, and opened an investigation after receiving the emails. R. 41, 48.

The investigation bore fruit. On April 2, 2008 – just before petitioner was scheduled to return to work – the United States Attorneys Office for the Northern District of Illinois obtained an indictment charging petitioner with a civil rights violation, 18 U.S.C. § 242. R. 1, 23, 71. Petitioner was charged with depriving Miles of his right to be free from unreasonable use of force. R. 1.

4. In federal district court, petitioner filed a series of pretrial motions, including a motion to dismiss based on *Garrity*, which asserted that, since petitioner was being prosecuted after he had made immunized statements, the burden shifted to the government to prove that the compelled statements had not been used, or derivatively used, in the federal prosecution. Petitioner argued that Weis had used his compelled statements in undertaking actions to focus the federal investigation on him.

In response, the government attached affidavits from prosecutors and an FBI agent. R. 40. Not attached to the government's response was any affidavit or statement by Weis. Nor did the government disclose Weis' actual emails. The government's affidavits reported that an Assistant United States Attorney not involved in prosecuting the petitioner

had removed petitioner's statements from the subpoenaed files. R. 41, 48. (It turned out, however, that unredacted portions of the OPS file in this record contained analysis and summaries of petitioner's statements. See Deft's Seventh Circuit Reply Brief 6-7 (citing R. 41, Ex. A, OPS 17-18).)

The district court denied petitioner's motion. The court found that the Seventh Circuit had not accepted the prohibitory rule (for derivative use of immunized information) stated in *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). Pet. App. 38-39. The court declared, "[M]ere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information." *Id.* at 39. The court also noted that "Weis was not part of the team within either the FBI or the U.S. Attorney's Office who investigated Cozzi's conduct or decided to pursue his prosecution." *Id.* Based on the redaction of materials subpoenaed by the grand jury, the court doubted that Weis' review of petitioner's compelled statements had a tangential effect on the federal prosecutors' thought processes. The court further said that *United States v. Hubbell,* 530 U.S. 27 (2000), had not called the "tangential influence" cases into question.[2] Pet. App. 40-42.

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[2] Petitioner moved for reconsideration. R. 50. The district court denied reconsideration, but retracted a portion of the earlier ruling relating to a waiver finding. Pet. App. 47-49.

Petitioner thereafter entered into a conditional guilty plea that reserved the right to appeal the denial of the *Garrity* motion. After accepting sentencing guidelines set forth in a presentence report, and entertaining arguments in aggravation that included the videotape of the incident, R. 72, and mitigation that included an outpouring of support from fellow police officers and Air Force reserves members, R. 74, the district court imposed a 40-month prison sentence. 6/11/09 Tr. 65-70; Pet. App. 22-32.

5. The court of appeals affirmed. Pet. App. 1. The court began its analysis by reciting the Fifth Amendment's prohibition against self-incriminating testimony. The court observed that, in some circumstances, the government may secure self-incriminating testimony through immunity. The court pointed out that "[t]his exception to the general rule against compelled self-incrimination stems in part from" this Court's decision in *Garrity*. *Id.* at 5-6. The Court also cited *Kastigar* as erecting a "total prohibition" on the use of compelled testimony, including testimony given as an "investigatory lead." *Id.* at 6-7.

The court emphasized that lower courts had diverged over the breadth of *Kastigar*'s prohibition. Citing *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973), the court stated, "Some courts have read *Kastigar* expansively to prohibit not only the introduction of compelled testimony into evidence, but also 'assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain,

interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.'" Pet. App. 6-7. The Seventh Circuit, however, has spurned this approach. As stated by the court below, "We . . . rejected this broad reading of *Kastigar,* opting instead for a more measured approach." *Id.* at 7. Citing cases from the Seventh and Eleventh Circuits, the court of appeals in this case declared that "mere tangential influence that privileged information" may have had on a prosecutor's thought processes in preparing for trial does not constitute a use of privileged information. *Id.* (citing *United States v. Velasco,* 953 F.2d 1467, 1474 (7th Cir. 1992); *United States v. Bolton,* 977 F.2d 1196, 1199 (7th Cir. 1992); *United States v. Schmidgall,* 25 F.3d 1523, 1529 (11th Cir. 1994)). The court further found that this Court's decision in *Hubbell* had not "upset" the "'tangential influence' line of cases." Pet. App. 15.

Applying its approach to petitioner's circumstances, the court of appeals presumed that Weis had "read Cozzi's protected statements and . . . was motivated to email his colleagues at the FBI because of what the protected statements contained." Pet. App. 10. These facts raised an issue of "the scope of derivative-use immunity." *Id.* at 11. The court held that Weis' tip to the FBI did not constitute "an impermissible non-evidentiary use of the compelled statement." *Id.* at 14. The court reasoned that petitioner's compelled statements could not have had a tangential influence on the federal prosecutors since Weis had told the FBI only that petitioner had falsified his

statement. Although the court granted that Weis' status (as an FBI agent and the incoming head of the Chicago Police Department) "likely weighed heavily in the FBI's decision to start an investigation," it determined that non-evidentiary use did not occur because the federal government had to "start its investigation . . . from scratch." *Id.* at 14. The court concluded that the government had proved that petitioner's compelled statements did not play a role in the federal investigation and prosecution.

The court of appeals further found this Court's decision in *Hubbell* to be distinguishable on grounds that the "chain of evidence was cut off between Weis and federal investigators because Weis did not communicate any of the contents of the statements in his email." *Id.* at 15-16. *Hubbell* involved an instance where the compelled statement prompted the federal investigation, while a tip by a third-party prompted the federal investigation in this case, so said the court. The court explained that the role of petitioner's compelled statements in motivating Weis' tip was "at least one step too far removed from the actual federal investigation to justify overturning" petitioner's conviction. *Id.* at 16. The court concluded that its decision did not "hearken[ ] back to the now repudiated 'silver platter' doctrine, which prohibits state law enforcement officials from obtaining evidence in violation of a person's constitutional rights and handing it over to federal prosecutors." *Id.*

REASONS FOR GRANTING THE PETITION

This case has become a lightning rod in the Chicago Police Department. Because of the superintendent's actions of serving up petitioner – who had already been prosecuted and convicted in state court – to federal prosecutorial authorities, rank and file police department members have no confidence in the superintendent. See James O'Shea, Despite Progress, Police Chief Still Struggles, *New York Times* (April 17, 2010), available at http://www.nytimes.com/2010/04/18/us/18cncweis.html?_r=1&scp=1&sq=weis+cozzi&st=nyt; see also Wikipedia, Jody Weis, available at http://en.wikipedia.org/wiki/Jody_Weis. To the legally uneducated, the dual state and federal prosecutions for the same conduct seemingly violates double jeopardy. See *Bartkus v. Illinois*, 359 U.S. 121, 163-64 (1959) (Black, J., dissenting). While that perception is incorrect (due to the dual sovereignty doctrine), this case is not barren of a Fifth Amendment violation. The abridgement derives from the Self-Incrimination Clause.

In *Kastigar v. United States*, 406 U.S. 441 (1972), and *United States v. Hubbell*, 530 U.S. 27 (2000), this Court made clear that there is a *total prohibition* on the use of immunized statements. Use of *any kind* – including non-evidentiary derivative use – is prohibited. See Samuel A. Alito, Jr., *Documents And The Privilege Against Self-Incrimination*, 48 Univ. Pitt. L. Rev. 27, 57-58 (1986). A comprehensive prohibition is necessary to protect the core of the privilege against self-incrimination, i.e., that a person compelled to speak through immunity must remain in the substantially same position as if she had exercised the

right to remain silent. *Kastigar*, 406 U.S. at 449; *Pillsbury Co. v. Conboy*, 459 U.S. 248, 255 (1983); *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Yet, in this case, a high-ranking law enforcement officer used petitioner's immunized statements. Influenced by the compelled statements, that official successfully pressed federal law enforcement officials to prosecute petitioner.

Certiorari should be granted because the circuits are badly fractured on the scope of the ban on use of immunized statements. Some circuits adhere to *Kastigar's* total prohibition against the use of immunized statements. Under this view, all derivative uses – including non-evidentiary uses – are prohibited. Other circuits, including the Seventh Circuit in this case, permit tangential or non-evidentiary use of immunized statements. This approach, however, is not true to *Kastigar* or *Hubbell*. Tangential or non-evidentiary use *is* still a use of immunized statements, and does not leave the declarant in substantially the same position as if she had exercised her Fifth Amendment right to remain silent. And that was the case here. But for a state law enforcement official's use of petitioner's immunized statements, petitioner would not have been prosecuted in federal court.

I. The Circuits Have Long Been Deeply Divided On Whether This Court's Total Prohibition On Use And Derivative Use Of Immunized Statements Permits Tangential Or Non-Evidentiary Use Of Immunized Statements

A. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), this Court held that, while a police officer may not remain silent in employment disciplinary proceedings, she does not lose her Fifth Amendment rights in respect to future criminal cases. This Court held that a police officer's invocation of the privilege against self-incrimination cannot be met with the response of employment termination: A public employee cannot constitutionally be given the "Hobson's choice between self-incrimination and forfeiting [their] means of livelihood." *Gardner v. Broderick*, 392 U.S. 273, 277 (1968); see also *Lefkowitz v. Turley*, 414 U.S. 70 (1973). *Garrity* held that officer statements, "obtained under threat of removal from office" could not be used against the declarant in later criminal proceedings. 385 U.S. at 500.

Lower courts have described the rule of *Garrity* as "self-executing immunity." See *Wiley v. Mayor and City Council of Baltimore*, 48 F.3d 773, 778 (4th Cir. 1995) (Powell, retired U.S. Sup. Ct. J.); see also *In re Federal Grand Jury Proceedings*, 975 F.2d 1488, 1490 (11th Cir. 1992); *Hester v. Milledgeville,* 777 F.2d 1492 (11th Cir. 1985); *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982). *Garrity* immunity is equivalent to the immunity conferred by 18 U.S.C. § 6002. See

United States v. Veal, 153 F.3d 1233, 1241 n. 7 (11th Cir. 1998); *Hester*, 777 F.2d at 1496. As stated in *United States v. Vangates*, 287 F.3d 1315, 1321 (11th Cir. 2002):

> The state, of course, can compel a public employee to answer questions in a formal or informal proceeding by granting that employee immunity from future criminal prosecution based on the answers given . . . Such immunity is the equivalent of the protection afforded an officer under *Garrity*, and is referred to as "use immunity."

See also *Chavez v. Martinez*, 538 U.S. 760, 768 (2003) (statutory immunity and government employee immunity enjoy the same scope under the Fifth Amendment); *United States v. Slough*, 677 F. Supp. 2d 112, 132 (D. D.C. 2009) ("although *Garrity* does not expressly invoke the protections of *Kastigar*, every circuit to have addressed the issue has held that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer received immunity from the use of her statements or their fruits in subsequent criminal proceedings") (citations and quotation marks omitted).

B. In *Kastigar v. United States*, 406 U.S. 441 (1972), the petitioners refused to testify despite being granted immunity pursuant to 18 U.S.C. § 6002, a statute that does not confer transactional immunity, but precludes direct or indirect use of "testimony or other information" derived from

immunized testimony. This Court considered whether the scope of this immunity was compatible with the Fifth Amendment's privilege against self-incrimination. Surveying prior cases, this Court observed that a grant of immunity must be "co-extensive with the scope of the privilege." 406 U.S. at 449. Although § 6002 is not a transactional immunity statute, this Court upheld its constitutionality on grounds that "immunity from use and derivative use is coextensive with the scope of the privilege." 406 U.S. at 453.

The *Kastigar* Court addressed the scope of immunity in response to the petitioners' arguments that the statute did not adequately protect a witness from various non-evidentiary uses of the immunized testimony such as obtaining investigative leads. This Court rejected this contention because the immunity statute "provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." *Id.* at 460. After quoting § 6002, this Court declared, *"This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."* 406 U.S. at 460. (emphasis added; footnote omitted). This Court further discerned that the burden of proof applicable to immunity claims – the prosecution bears a "heavy burden" of showing an independent, legitimate source for disputed evidence once a defendant demonstrates

that he provided immunized testimony – provides a "very substantial protection commensurate with that resulting from invoking the privilege itself." *Id.* at 461; see also *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 n. 18 (1964).

This Court reaffirmed *Kastigar* in *United States v. Hubbell,* 530 U.S. 27 (2000). The *Hubbell* Court initially addressed whether the Fifth Amendment phrase "in any criminal case" limits "its coverage to compelled testimony that is used against the defendant in the trial itself." *Id.* at 37. This Court answered the query in the negative, stating, "It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *Id.* This Court reaffirmed the immunity statute's prohibition of derivative use, and the "comprehensive safeguard" discussed in *Kastigar*.

According to the prosecution in *Hubbell*, it would not be making use of Hubbell's immunized testimony since it did not intend to introduce at trial documents produced pursuant to immunity. The Court rejected this position, reasoning that the question "is not whether the response to the subpoena may be introduced into evidence at his criminal trial." *Id.* at 41. Rather, the separate question was whether the prosecution had "already made 'derivative use' of the testimon[y] . . . in obtaining the indictment . . . and

preparing its case for trial. It clearly has." *Id.* This Court stated:

> It is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution. The documents did not magically appear in the prosecutor's office like "manna from heaven." They arrived there only after respondent asserted his constitutional privilege, received a grant of immunity, and – under the compulsion of the District Court's order – took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through respondent's truthful reply to the subpoena that the Government received the incriminating documents of which it made 'substantial use . . . in the investigation that led to the indictment.'

Id. at 42-43.

C. *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), is one of the earliest post-*Kastigar* cases. Defendant in that case, a bank president, gave immunized testimony before a state grand jury. Not realizing the testimony was protected by immunity, a federal prosecutor read the transcripts and returned them to the state prosecutor. Two federal indictments against defendant were ultimately quashed (post trial) by the district court. On appeal, the government

proffered voluminous FBI reports to show an independent source for its trial evidence. The Eighth Circuit found that, while the reports may have provided an independent source, they failed to satisfy the government's burden that the prosecution did not in some way (short of admitting defendant's testimony into evidence) use the tainted the evidence. *Id.* at 311. The court pronounced, "Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *Id.*

McDaniel has engendered a sharp division among the courts of appeal, district courts and scholars. The court in *United States v. North*, 910 F.2d 843, 857 (D.C. Cir. 1990), *modified on reh'g*, 920 F.2d 940 (*per curiam*), identified the split as follows:

> As we suggested above . . . courts have differed on this question. Compare *United States v. Semkiw,* 712 F.2d 891 (3d Cir. 1983); *United States v. Pantone*, 634 F.2d 716, 723 (3d Cir. 1980); *United States v. First W. State Bank*, 491 F.2d 780, 787-88 (8th Cir.), *cert. denied*, 419 U.S. 825, 95 S.Ct. 42, 42 L.Ed.2d 49 (1974); *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973); *United States v. Carpenter*, 611 F. Supp. 768, 779 (N.D. Ga. 1985); *United States v. Smith*, 580 F. Supp. 1418, 1421-22 (D. N.J. 1984); and *United States v. Dornau*, 359 F. Supp. 684, 687 (S.D. N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473

(2d Cir. 1974) (all holding or strongly suggesting that *Kastigar* prohibits nonevidentiary use of compelled testimony) with *United States v. Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States v. Mariani*, 851 F.2d 595, 600-01 (2d Cir. 1988), *cert. denied*, 490 U.S. 1011, 109 S.Ct. 1654, 104 L.Ed.2d 168 (1989); *United States v. Crowson*, 828 F.2d 1427, 1431-32 (9th Cir. 1987), *cert. denied*, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988); and *United States v. Byrd*, 765 F.2d 1524, 1528-31 (11th Cir. 1985) (all holding or observing that *Kastigar* does not prohibit nonevidentiary use of compelled testimony).

The two principal scholarly commentaries on the nonevidentiary use aspect of *Kastigar* also disagree. Compare Strachan, Self-Incrimination, Immunity, and Watergate, 56 Tex. L. Rev. 791, 820 (1978) ("[U]nless an immunized defendant is accorded a firm right to discovery and a comprehensive pretrial hearing on the issues of evidentiary and nonevidentiary use, the defendant is left totally dependent on the good faith of the prosecutors for the preservation of his constitutional rights – the result both the majority and dissent in *Kastigar* regarded as constitutionally unacceptable.") with Humble, Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, 66 Tex. L. Rev. 351, 355-56 (1987) ("[N]either the immunity statute nor the fifth amendment requires the government to prove that it made no nonevidentiary uses of the defendant's compelled testimony.").

With respect to the conflict's merits, the *North* court surveyed cases that do not foreclose prosecution when "immunized testimony might have tangentially influenced the prosecutor's thought process in preparing for the indictment and preparing for trial." 910 F.2d at 859 (citations and quotations omitted). The *North* court nevertheless deemed "troubling" cases holding that *Kastigar* "allows nonevidentiary use of compelled testimony under all circumstances." *Id.* at 859-60. The *North* court ultimately did "not decide the question of the permissibility or impermissibility of nonevidentiary use," *id.* at 856; rather, the court found that "the use of immunized testimony – before the grand jury or at trial – to augment or refresh recollection is an evidentiary use." *Id.* at 857-60; see also *United States v. Serrano*, 870 F.2d 1, 16 (1st Cir. 1989).

The conflict has continued to fester in *North's* wake. In *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992), the Seventh Circuit "join[ed] three of our sister circuits and reject[ed] the reasoning of *McDaniel*." Other courts, including the Seventh Circuit in this case, have acknowledged the conflict. Pet. App. 7 ("Some courts have read *Kastigar* expansively to prohibit not only the introduction of compelled testimony into evidence, but also 'assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.' . . . We, however, rejected this broad reading of *Kastigar*, opting instead

for a more measured approach.") (citations omitted); *United States v. Schmidgall*, 25 F.3d 1523, 1529 (11th Cir. 1994) (citing Eleventh Circuit's disagreement with *Semkiw* and *McDaniel*), and *id.* at 1530 n. 8 (noting that the court in *United States v. Byrd*, 765 F.2d 11524, 1529-31 (11th Cir. 1985) had disapproved "'non-evidentiary' interpretation of *Kastigar*"); *United States v. Bolton*, 977 F.2d 1196, 1199 (7th Cir. 1992) (citing cases); *Gwillim v. City of San Jose*, 929 F.2d 465, 467 (9th Cir. 1991) ("In the context of the use of immunized statements in the criminal case there has been a division among circuits as to what is broadly described as 'the non-evidentiary use of immunized testimony.'"); *Slough*, 677 F. Supp. 2d at 131 (staking out the D.C. Circuit's position in *North*); *Rameses v. Kernan*, 2007 WL 4200814, *15 (E.D. Cal. 2007) ("two panels of the Ninth Circuit cannot agree whether *Kastigar* precludes the non-evidentiary use of immunized testimony"); *United States v. Weissman*, 1996 WL 751386, *9 (S.D. N.Y. 1996) (recognizing that Second Circuit's decision in *Mariani* (which definitively rejected *McDaniel*) conflicted with earlier Second Circuit authority and "is in conflict with some of our sister circuits"); *United States v. McGee*, 798 F. Supp. 53, 61 (D. Mass. 1992) ("[t]he First Circuit . . . has rejected [the] view" that the government has an insurmountable task in discharging its burden of proving no non-evidentiary use where the prosecutor has been exposed to immunized testimony); *United States v. Harris*, 780 F. Supp. 385, 392-93 (N.D. W.Va. 1991) (citing *North* and *McDaniel* and holding that prosecution failed to sustain its burden that

information gleaned from immunized witness' interview was not used directly or indirectly in preparing the indictment); *United States v. Sklar*, 752 F. Supp. 1252, 1261 n. 9 (E.D. Pa. 1990) ("*Kastigar* does not directly address the permissible scope of nonevidentiary use of immunized testimony [and] [c]ircuit courts are split on this question.").

McDaniel and its progeny espouse the better view. *McDaniel* did no more than repeat and apply language from *Kastigar*. Under this approach, both evidentiary *and* non-evidentiary uses of immunized information are protected. By holding that non-evidentiary use of compelled testimony or information constitutes a use, protection against derivative use is ensured. The essence of the prohibition against use of immunized information is to ensure that the provider of the immunized information remains in substantially the same position as if she had exercised her Fifth Amendment right to remain silent. That ideal is no less at stake when governmental authorities use compelled information in a non-evidentiary manner.

The view of the First, Second, Seventh, Ninth and Eleventh Circuits condones non-evidentiary use of immunized testimony and information. This tact is not supported by this Court's cases, or the language of the immunity statute. This Court simply has not approved "a little" use of immunized information or testimony. See *North*, 910 F.2d at 861 ("*Kastigar* does not prohibit simply 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled testimony. It

prohibits '*any* use,' direct or indirect."); see also *Chavez*, 538 U.S. at 769 & 770-71 (noting that *Kastigar* prohibits both "use and derivative use" of immunized testimony in criminal cases); *Braswell v. United States*, 487 U.S. 99, 117 (1988) ("Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly or derivatively.").

The "tangential" influence test, employed by the lower courts in this case, does not derive from any holding of this Court. It is a test composed by the lower courts that does not account for this Court's proscription against direct *and* derivative uses of immunized utterances. See *United States v. Hsia*, 131 F. Supp. 2d 195, 202 (D. D.C. 2001) (nothing in *Kastigar* or its progeny "permits an artificial distinction between non-evidentiary and evidentiary use that could relieve a court of *Kastigar*'s unequivocal command"); but see *United States v. Mauro*, 846 F. Supp. 245, 253 (W.D. N.Y. 1994) ("[t]he Second Circuit has emphasized that the primary focus of *Kastigar* . . . is on *evidentiary* use . . . the immunity statute "is concerned primarily with evidence that will be used against the defendant at trial") (emphasis original).

Uncertainty in this area has also arisen regarding the burden of proof.[3] Courts have found lack of

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[3] Some courts have attributed the above-described confusion to the "elusive" nature of nonevidentiary use, and perceive that "*Kastigar* does not define, except perhaps by implication, what nonevidentiary use of compelled testimony might be nor

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"guidance as to the specific standard of proof to be imposed on the government in a *Kastigar* hearing." *United States v. Smith*, 580 F. Supp. 1418, 1422 (D. N.J. 1984). Courts have debated whether the standard is preponderance, clear and convincing, *id.*, or "virtually undischargeable." *McDaniel*, 482 F.2d at 312; see also *In re Starkey*, 600 F.2d 1043, 1049 (8th Cir. 1979) ("The prosecuting government bears a very heavy burden in proving, once a witness has been given immunity, that subsequent evidence against that individual is not 'tainted' by the immunized testimony."). Whether "nonevidentiary use imposes the same 'heavy burden' on the Government" is yet another point of controversy. See *United States v. Poindexter*, 951 F.2d 369, 374-75 (D.C. Cir. 1991) (reversing on grounds that district court's "various applications of its standard even more clearly betray a conception of 'use' much narrower than ours in *North*"); cf. *United States v. Hemsley*, 726 F. Supp. 929, 932-33 (S.D. N.Y. 1989) (discussing district court's approach in *Poindexter*).

The confusion concerning the scope of the prohibition against use of immunized testimony or information is not new. As stated in a 1986 law review article written by now-Justice Alito:

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does it expressly discuss the permissible scope of such use." *North*, 910 F.2d at 857; see also *Sklar*, 752 F. Supp. at 1261 n. 9; *Slough*, 677 F. Supp. 2d at 131.

> Lower courts have extended the scope of use immunity even farther. For example, it has been held that immunized testimony may not be permitted to influence the decision to indict or strategic decisions at trial. *See, e.g.*, *United States v. Semkiw*, 712 F.2d 891 (3d Cir. 1983); *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973); *United States v. Smith*, 580 F. Supp. 1418 (D. N.J. 1984). *But see United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985) (possibility that government could use immunized testimony in making strategic trial decisions not ground for dismissing indictment). There is also lower court authority holding that a grand jury that receives immunized testimony cannot indict the witness. *United States v. Hinton*, 543 F.2d 1002 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). *See also United States v. Zielezinski*, 740 F.2d 727 (9th Cir. 1984).

Samuel A. Alito, Jr., *Documents And The Privilege Against Self-Incrimination*, 48 Univ. Pitt. L. Rev. 27, 57 n. 151 (1986).

As illustrated by this case, *Hubbell* has not been interpreted to preclude all use of immunized information. Questions regarding the scope of the prohibition against the use of immunized information regularly arise, and the majority of the circuits have had the opportunity to weigh-in on the issue. The time has come for this Court to put the uncertainty to rest.

II. The Court Of Appeals Wrongly Decided An Important And Recurring Fifth Amendment Question

By employing the "tangential" influence test to find that petitioner's Fifth Amendment rights were not violated, the Seventh Circuit did not leave petitioner in the same position as if he had exercised his Fifth Amendment right to remain silent. This is so even though, as the Seventh Circuit said in this case, Pet. App. 14, the federal prosecutors had to start "from scratch" after receiving Weis' tip. See *United States v. Semkiw,* 712 F.2d 891 (3rd Cir. 1983) (although prosecution already possessed all its evidence against the defendant before it compelled defendant to testify, the government failed to show that the prosecution and defendant were in substantially the same position as if the defendant had not been compelled to testify). But the decision to prosecute petitioner did not arise in the minds of federal prosecutors "like 'manna from heaven.'" *United States v. Hubbell,* 530 U.S. 27, 42 (2000). Rather, it is directly traceable to Weis' use of petitioner's immunized statements.

The Seventh Circuit concluded that Weis had "read Cozzi's protected statements and . . . was motivated to email his colleagues at the FBI because of what the protected statements contained." Pet. App. 10. That certainly constituted a use of immunized statements. That the particular federal prosecutors in petitioner's federal case claimed not to have been influenced by the compelled statements matters not.

Kastigar precludes use of immunized information to "focus" an investigation. *Kastigar v. United States*, 406 U.S. 44, 460 (1972). The good faith of particular prosecutors is irrelevant. *Id.*; *United States v. Hsia*, 131 F. Supp. 2d 195, 201 (D. D.C. 2001).

Petitioner's compelled statements sufficiently motivated Weis to prompt a federal civil rights prosecution of petitioner. That was a derivative use of compelled statements in a criminal case. While Weis technically may not have been a member of the federal prosecution "team," this Court's cases have not made "prosecutorial team" the litmus test for what constitutes use. Furthermore, the efficacy of a "Chinese Wall" has been questioned. See *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting); *United States v. Nemes*, 555 F.2d 51, 55 (2nd Cir. 1977); *United States v. Smith*, 580 F. Supp. 1418, 1422-23 (D. N.J. 1984). Thus, irrespective of the line prosecutors' denials of exposure to petitioner's compelled statements, petitioner's compelled statements were used to focus a federal criminal prosecution on him. Both "extraction *and use* of compelled" statements occurred, thereby raising a "true Fifth Amendment claim[ ]." *Chavez v. Martinez,* 538 U.S. 760, 767 (2003) (quoting *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (O'Connor, J., concurring in part and dissenting in part) (emphasis as in *Chavez*)).

The correct focus (no pun intended) in this case should have been whether the federal government "would have taken the same steps entirely apart from the motivating effect of the immunized testimony."

United States v. Ponds, 454 U.S. 313, 328 (D.C. Cir. 2006) (quoting *United States v. Nanni*, 59 F.3d 1425, 1443 (2nd Cir. 1995)); cf. *United States v. Hylton*, 294 F.3d 130, 134 (D.C. Cir. 2002) (*Kastigar* violation occurs where exposure to immunized testimony was a "cause" of the witness' decision to testify); *United States v. North*, 920 F.2d 940, 944 (D.C. Cir. 1990) (*per curiam*) (impermissible use occurs when witness' decision to testify is influenced by immunized testimony). That is a variant of the harmless error test eschewed here. At no point did the government satisfy its burden of establishing that the federal government would have initiated a dual sovereignty prosecution of petitioner absent the actions of Weis – the person whose office extracted the statements from petitioner and the person who used petitioner's statements. By not disclaiming that a prosecution would have been brought absent Weis' intervention, the government failed to discharge its burden. See *United States v. Slough,* 677 F. Supp. 2d 112, 160 (D. D.C. 2009) (Declarant's immunized disclosure to government agents "played a determinative role in the government's decision to prosecute him. This significant and tangible nonevidentiary use of the compelled testimony . . . is barred by *Kastigar* and *Garrity*.").

The court below also claimed not to be returning the silver platter doctrine. Pet. App. 16-17. But saying words and the substance of what occurred are two different things. *Reminiscences of Abraham Lincoln by distinguished men of his time/collected and edited by Allen Thorndike Rice* (1853-1889), p. 342

(Harper & Brothers Publishers, 1909) ("Calling a dog's tail a leg, doesn't make it a leg."). Outlaw of the silver platter doctrine – which prohibits state officials handing over unconstitutionally-obtained evidence to federal prosecutors, *Elkins v. United States*, 364 U.S. 206 (1960) – has applicability in the immunity context. This much is clear from *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964), in which this Court stated, "[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used *in any manner* by federal officials in connection with a criminal prosecution against him.") (emphasis original). That is what occurred in this case: petitioner was compelled to give incriminating testimony to municipal police investigators; unsatisfied with the punishment that had been meted out by the state courts and the administrative board, and motivated by petitioner's compelled statements, the soon-to-be superintendent contacted FBI colleagues and successfully urged them to focus a second criminal investigation and prosecution on petitioner. A state official used petitioner's immunized statements to hand over petitioner on a silver platter for federal prosecution.

As stated above, the cases generally traverse three categories in respect to the scope of the prohibition against use of immunized statements. On one hand, some cases interpret *Kastigar* and its progeny as prohibiting any non-evidentiary use. Other cases reject this approach and find that nonevidentiary use of immunized statements compatible with the Fifth

Amendment. The D.C. Circuit in *North* struck a middle ground. In this case, the court of appeals adhered to the line of cases allowing non-evidentiary use of compelled statements. If prosecuted in a Circuit that does not follow this approach, the government could not have satisfied its *Kastigar* burden. Absent this Court's intervention, lower courts will continue to struggle with issues relating to the use of immunized statements. To provide clarity on this important and recurring situation, and to protect the Fifth Amendment rights of the populace, certiorari should be granted.

CONCLUSION

WHEREFORE, based on the foregoing, Petitioner William Cozzi respectfully moves this Honorable Court to grant certiorari, vacate the judgment, remand for reconsideration and/or order any other appropriate relief.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 09-2648

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM COZZI,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 08 CR 276 – **Blanche M. Manning**, *Judge.*

ARGUED FEBRUARY 18, 2010 – DECIDED JULY 30, 2010

Before EASTERBROOK, Chief Judge, and KANNE and ROVNER, Circuit Judges.

KANNE, *Circuit Judge.* Chicago Police Officer William Cozzi shackled a man to a wheelchair in a hospital and then repeatedly bludgeoned him in the head and face with a sap.[1] He now appeals the district

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[1] Although the record does not contain a description of the actual weapon that Cozzi used, a sap is generally described as "a

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court's denial of his motion to dismiss the indictment charging him with violating his victim's civil rights. He also appeals the district court's use of the sentencing guideline for aggravated assault rather than the guideline for civil rights violations. Neither of the issues Cozzi raises on appeal has merit. We therefore affirm Cozzi's conviction and sentence.

I. BACKGROUND

Randle Miles was stabbed during an altercation in August 2005. He then drank heavily before an ambulance came and took him to Norwegian American Hospital in Chicago. William Cozzi, a Chicago Police Department officer, was dispatched to the scene of the altercation, but eventually made his way to the hospital to talk with Miles. Miles was apparently being loud and abusive to hospital staff, so Cozzi placed Miles under arrest, handcuffing him to a wheelchair and shackling his legs. While several witnesses looked on, Cozzi then hit Miles repeatedly with a non-police-issued sap. Cozzi later falsified a police report and misdemeanor complaints claiming that Miles had thrown punches and that Cozzi had struck Miles with his hand; he never mentioned the sap. The incident, however, was caught on tape by a hospital security camera. The hospital contacted the

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leather-covered flat or round piece of lead with a spring handle, although it could contain lead shot rather than a solid piece of metal." Jack Lewis et al., *The Gun Digest Book of Assault Weapons* 42 (7th ed. 2007).

Chicago Police Department's Office of Professional Standards ("OPS") later that month to report the incident.

OPS started an investigation the day after the hospital reported the incident. It interviewed several witnesses and obtained a copy of the video and 911 calls related to the event. On September 14, 20, and 21, 2005, OPS interviewed Cozzi. He was first given administrative rights, which compelled him to make a statement or lose his job, but which also guaranteed that his statements could not be used against him in any future criminal proceedings. Ultimately, OPS concluded that Cozzi should be terminated from the Chicago Police Department.

In December 2005, Cozzi was indicted in Cook County for aggravated felony battery and official misconduct. He pled guilty in May 2007 to a reduced misdemeanor battery charge, for which the court sentenced him to eighteen months' probation and required him to attend anger management classes. The superintendent of the Chicago Police Department filed charges in April 2006 to fire Cozzi from the police department. The Chicago Police Board held public hearings in July and August 2007 in which Cozzi was called as an adverse witness. In October 2007, the Police Board decided 6-2 to suspend Cozzi for two years rather than terminate him. His suspension was made retroactive to April 2006. The Cook County Circuit Court Chancery Division affirmed the decision in July 2008 over the city's appeal.

Former FBI agent Jody Weis was scheduled to become the Chicago Police Department's superintendent on February 1, 2008. In January 2008, Weis told the press that he was unhappy with the Police Board's decision and promised to review Cozzi's case. That same month, Weis sent two emails to an agent in the FBI's Chicago field office, asking whether the FBI had investigated Cozzi for civil rights violations and mentioning that the former superintendent had unsuccessfully tried to fire Cozzi and that Cozzi had "falsified his statement." Weis also attached a copy of the video clip of the incident. The FBI had not yet started an investigation, but it quickly did. In April 2008, a federal grand jury indicted Cozzi on one count of violating 18 U.S.C. § 242 by depriving Miles of his right to be free from the unreasonable use of force. None of the federal prosecutors saw or reviewed Cozzi's immunized statements, and his protected statements were removed from the OPS files that were turned over to the federal grand jury.

Cozzi filed a motion in the district court seeking to have the indictment dismissed on the grounds that the government had improperly used his immunized statements in violation of *Garrity v. New Jersey,* 385 U.S. 493 (1967). The district court denied his motion, finding that no one on the prosecution team reviewed the statements and that Weis could not have had more than a "tangential influence" on the prosecution team's trial strategy. Cozzi entered a conditional guilty plea, reserving his argument under *Garrity* to appeal. He also objected to several issues regarding

the applicable sentencing guidelines and calculations. The district court sentenced Cozzi to forty months' imprisonment in June 2009. This appeal followed.

II. Analysis

Cozzi argues on appeal that the district court should have dismissed the indictment because Weis's review of his protected statements and subsequent tip to the FBI constituted an improper use of his statements in violation of *Garrity*, 385 U.S. 493, and *Kastigar v. United States*, 406 U.S. 441 (1972). He also argues that the district court erred by calculating his base offense level under the guideline for aggravated assault rather than the guideline for civil rights violations.

A. Use of Immunized Statements

We review the district court's legal conclusions *de novo* and its factual findings for clear error. *See United States v. Greve*, 490 F.3d 566, 570 (7th Cir. 2007). The Fifth Amendment, applicable to the states via the Fourteenth Amendment, provides that a person cannot be compelled to testify if in so doing he would incriminate himself. U.S. Const. amend. V. In some circumstances, however, the government may compel someone to testify, even if the testimony is incriminating, if the government gives the witness immunity. *See, e.g.*, 18 U.S.C. § 6002. This exception to the general rule against compelled self-incrimination stems in part from the Supreme Court's

decision in *Garrity,* 385 U.S. 493. There, several police officers were interviewed as part of an investigation into fixing traffic tickets. The officers were faced with a daunting choice: they were free to invoke their right not to incriminate themselves, but any officer that refused to testify would lose his job. The state then used some of the officers' testimony, over the officers' objections, in a later criminal trial. *Id.* at 494-95. The issue made its way to the Supreme Court, which held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. . . ." *Id.* at 500.

Later, in *Kastigar,* 406 U.S. 441, the Supreme Court upheld the constitutionality of a federal immunity statute, explaining that to supplant the Fifth Amendment's privilege, the government is only required to provide "use and derivative-use immunity" – that is, that the government cannot introduce the compelled testimony into evidence at a later trial, or make derivative use of the testimony. *Id.* at 453. The Court noted that use and derivative-use immunity "prohibits the prosecutorial authorities from using the compelled testimony in any respect. . . ." *Id.* It specified that "[t]his total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Id.* at 460 (footnote omitted). Once the

defendant shows that he made a protected statement, federal prosecutors have "the affirmative duty to prove that the evidence [they] propose[ ] to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.*

Some courts have read *Kastigar* expansively to prohibit not only the introduction of compelled testimony into evidence, but also "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *See, e.g., United States v. McDaniel,* 482 F.2d 305, 311 (8th Cir. 1973). We, however, rejected this broad reading of *Kastigar,* opting instead for a more measured approach. *See United States v. Velasco,* 953 F.2d 1467, 1474 (7th Cir. 1992).

We held in *Velasco* that "the mere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information." *Id.* This approach acknowledges that "[t]he burden on the prosecution to establish an independent source for evidence against a defendant is a heavy one indeed," but that it should not be an impossible one to bear. *Id.* We re-affirmed *Velasco's* "tangential influence" approach in *United States v. Bolton,* 977 F.2d 1196, 1199 (7th Cir. 1992). Ours is not the only circuit to adopt this approach to *Kastigar* immunity. *See, e.g., United States v. Schmidgall,* 25 F.3d 1523, 1529 (11th Cir. 1994) ("[T]his Circuit has adopted the

'evidentiary' interpretation of *Kastigar*: that the focus of a challenge on self-incrimination grounds should be on the direct and indirect evidentiary uses of immunized testimony, rather [than] on non-evidentiary matters such as the exercise of prosecutorial discretion.").

Cozzi argues that the Supreme Court's decision in *United States v. Hubbell,* 530 U.S. 27 (2000), upset our "tangential influence" line of cases. In *Hubbell,* the government made several broadly worded discovery requests, with which the defendant refused to comply because some of the documents might have been incriminating. When the government gave the defendant immunity "to the extent allowed by law," the defendant provided more than 13,000 pages to the prosecutor. *Id.* at 31. The prosecutor later prepared new charges against the defendant based on information gleaned from the produced documents that was previously unknown to the prosecutor. *Id.* The Court held that the indictment had to be dismissed because "the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution." *Id.* at 42. Important to the Court's conclusion was the fact that "[i]t was only through respondent's truthful reply to the subpoena that the government received the incriminating documents of which it made substantial use . . . in the investigation that led to the indictment." *Id.* at 42-43 (internal quotation marks and footnote omitted) (second alteration in original).

Against this backdrop, Cozzi argues that his conviction should be overturned because he claims that his statements were improperly used against him. Cozzi's theory on appeal of who used his statements improperly has gradually expanded from initial briefing to oral argument. In his initial brief, in which he had the opportunity to define the scope of the appeal, Cozzi argued only that Weis's tip to the FBI constituted an improper use of his protected statements. But in his reply brief, Cozzi added a complaint that the federal prosecutors may have been exposed to, and thus afforded the opportunity to improperly use, his protected statements because the OPS file contained references to his statements, although the statements themselves had been removed from the file. Then, at oral argument Cozzi added the OPS investigators to his list, arguing that the government had not met its burden to show that the OPS investigators had not made improper use of his statements in conducting their investigation.

An appellant cannot raise new theories or issues in a reply brief or at oral argument, *United States v. Wescott,* 576 F.3d 347, 354 (7th Cir. 2009) (reply brief); *Holman v. Indiana,* 211 F.3d 399, 405-06 (7th Cir. 2000) (oral argument), so Cozzi has waived any complaint he may have had about the government meeting its burden regarding the federal prosecutors and OPS investigators. To the extent that Cozzi was justified in failing to mention his complaint about the federal prosecutors' exposure because certain documents were sealed until after his initial brief was

due, we find that references to Cozzi's statements in the OPS files did not expose the prosecutors improperly to the content of Cozzi's protected statements. Although the OPS report does negate various aspects of Cozzi's testimony, it appears that the specific facts mentioned are derived from statements that Cozzi made in unprotected reports. The one statement that came directly from his protected statement was appropriately redacted and gives us no further cause for concern.

Turning now to Cozzi's argument regarding Weis, we find that Weis's tip to the FBI did not constitute an improper use of Cozzi's protected statement. As an initial matter, we note that the question of whether Weis reviewed Cozzi's protected statements remains unanswered because the government did not see fit to submit an affidavit from Weis explaining what he did or did not read. We also do not know, although we may speculate, why Weis referred Cozzi's case to the FBI. Because the government bears the burden to prove that the statements were not improperly used, we think it fair to assume for purposes of this appeal that Weis read the protected statements, and we may even assume that he was motivated to email his colleagues at the FBI because of what the protected statements contained. However, those assumptions do not end our inquiry into whether Cozzi's statements were improperly used, thus requiring us to overturn his conviction.

There is no question that *Kastigar* bars not only evidentiary use of compelled testimony but also

non-evidentiary, or derivative, use of the same. At issue here is the scope of derivative-use immunity. The case law does not say that a defendant's immunized statements may never be used by anyone under any circumstances. *Garrity,* for example, clearly contemplated that the officers' compelled testimony could be used for internal investigation purposes. 385 U.S. at 500 (noting that the Fourteenth Amendment only prohibited the use of coerced statements in "subsequent criminal proceedings"). Here, there is no question that OPS was well-within the bounds of the law to compel Cozzi's testimony and use it for its own limited investigatory purposes. The question, then, is not simply whether the statements were used; rather, the constitutional guarantee that a defendant be free from compelled self-incrimination is concerned with *how* and *by whom* the statements are used.

Kastigar immunity is primarily concerned with the prosecutor's use of compelled testimony because it is the prosecutor who actually initiates and pursues criminal proceedings against a defendant. Thus, *Kastigar* held that use or derivative-use immunity is co-extensive with the Fifth Amendment privilege because it "prohibits *the prosecutorial authorities* from using the compelled testimony in any respect. . . ." 406 U.S. at 453 (emphasis added); *see also id.* at 462 ("We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and *the prosecutorial authorities* in substantially the same position as if the witness had claimed the Fifth Amendment privilege." (emphasis added)). The Court has also held

that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials *in connection with a criminal prosecution against him.*" *Murphy v. Waterfront Comm'n of N.Y.*, 378 U.S. 52, 79 (1964) (emphasis added). Cozzi appears to agree with this general proposition. (*See* Appellant's Br. at 12) ("The *prosecution* is *wholly* precluded from making any direct use, or derivative use, of compelled testimony." (first emphasis added)). The fact that the *prosecution* bears the burden to prove that all of its evidence comes from legitimate sources bolsters our understanding that the prosecution is the number-one concern of *Kastigar* immunity. *Velasco*, 953 F.2d at 1474.

Cozzi has not brought to our attention a single case where a non-prosecutor's use of a compelled statement, by itself, was held to be a violation of the defendant's Fifth Amendment privilege. To be sure, the government has not cited any cases where a non-prosecutor's use of a compelled statement was held not to be a violation of the defendant's Fifth Amendment privilege. *But see id.* at 1474 (concluding that the prosecutor's use, if any, of protected statement was not improper). The dearth of cases in either category further supports the proposition that it is the prosecutor's use of a compelled statement that is of primary concern.

That is not to say that other individuals' use of protected statements cannot run afoul of a defendant's immunity rights. *See, e.g., United States v. North,* 920 F.2d 940, 942 (D.C. Cir. 1990) ("*Kastigar* is . . . violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of *how* or *by whom* he was exposed to that compelled testimony. Were the rule otherwise, a private lawyer for a witness sympathetic to the government could listen to the compelled testimony and use it to prepare the witness for trial. The government would presumably thereby gain the advantage of use of the immunized testimony so long as it did not actually cooperate in that effort."); *In re Corrugated Container Antitrust Litigation,* 644 F.2d 70, 76-77 (2d Cir. 1981) (finding that a prosecutor cannot use answers by a witness to questions posed by a *civil litigant* if those questions were derived from a protected statement). But the limits on use by non-prosecutors must be understood in terms of their relationship to the prosecutor's actions in future criminal proceedings. After all, immunity is concerned with "insur[ing] that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar,* 406 U.S. at 453.

Turning now to the facts before us, Cozzi argues that Weis's tip to the FBI was an impermissible use of his protected statements because "but for" Weis's tip there would not have been a federal investigation and indictment. Cozzi argues that, like the compelled discovery documents in *Hubbell,* Weis's tip was the

first step in a chain of evidence that led to criminal proceedings against him. We disagree. We find that Weis's tip alone, without communicating the substance of Cozzi's statements to federal officials, does not constitute an impermissible non-evidentiary use of the compelled statement.

We are not concerned with how *Weis* may have influenced the federal investigation, but rather how Cozzi's *statements* influenced the investigation. When framed properly, it is clear that Cozzi's statements could not have had even a tangential influence on the federal prosecutors. Weis did not tell his former colleague at the FBI what Cozzi's statements contained, and we do not think that simply saying a statement was "falsified," by itself, is enough to impute improper use of the statement to prosecutorial authorities. *Cf. Bolton,* 977 F.2d at 1199 (noting that the defendant's "denials of wrongdoing and assertions that the witnesses at the first trial had lied . . . [could not] have been much help to the prosecution"). We do not ignore that Weis's standing as a former FBI agent and as the incoming head of the Chicago Police Department most likely weighed heavily in the FBI's decision to start an investigation. But Weis's resumé does not alter the fact the FBI had to start its investigation into Cozzi from scratch. Weis's emails, devoid of any details about Cozzi's protected statements, provided federal authorities with no evidentiary leads or other information that they could use to focus their investigation. In other words, the federal officials were "'in substantially the

same position as if [Cozzi] had claimed his privilege in the absence of a grant of immunity.'" *Hubbell,* 530 U.S. at 40 (*quoting Kastigar,* 406 U.S. at 458-59). Under these circumstances, we find that whatever influence Cozzi's protected statements may have had on Weis, the government has proven that the statements played no prohibited role in the federal investigation into Cozzi or his subsequent prosecution.

We are not persuaded by Cozzi's argument that *Hubbell* compels a different outcome. We read *Hubbell* as an affirmation of the doctrine, fully explained in *Kastigar,* 406 U.S. at 460, that the government bears the burden of proving "'that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.'" *See Hubbell,* 530 U.S. at 40 (*quoting Kastigar,* 406 U.S. at 460). The prosecutors in *Hubbell* failed to meet their burden of proving that the evidence leading to the subsequent charges against the defendant did not come from a wholly legitimate source other than the defendant's protected statement. *Id.* at 44-45. The Court said that because the defendant's compelled disclosure was the first step in the chain of evidence that led to the criminal charges against him, the prosecution violated his Fifth Amendment privilege. *Id.* at 42. Nothing in the language of *Hubbell* upsets our view of *Kastigar* immunity as explained in *Velasco* and *Bolton.*

Here, the chain of evidence was cut off between Weis and federal investigators because Weis did not communicate any of the contents of the statements in

his email. What's more, in *Hubbell* it was the defendant's protected statement itself that prompted the federal investigation. Here, it was not the statement itself but a tip by a third party that prompted the investigation. As discussed above, we evaluate a non-prosecutor's use of protected testimony only as it relates to actual criminal proceedings against the defendant. Whatever role the statements might have had in motivating Weis's tip is at least one step too far removed from the actual federal investigation and prosecution to justify overturning Cozzi's conviction. On the facts before us, we conclude that the compelled statements, if they had any influence at all, could have had only a tangential influence on the federal investigation and prosecution.

Finally, we do not think that our decision today hearkens back to the now repudiated "silver platter" doctrine. That phrase arises from the practice of state law enforcement officials obtaining evidence in violation of a defendant's constitutional rights and then handing it over to federal prosecutors, who were permitted to use the evidence because they were not the wrongdoers. The practice has since been repudiated in no uncertain terms. *See Elkins v. United States,* 364 U.S. 206, 223 (1960). A tip by a third party, even one whose tip carries great weight, is not the same as handing over unconstitutionally obtained evidence to the federal government to use in criminal proceedings against the defendant. We think there is a meaningful difference between Weis telling the FBI that it ought to consider investigating Cozzi and Weis

telling the FBI the substance of Cozzi's protected statements. For the reasons stated above we find that the government has met its heavy, but not insurmountable, burden of proving that all of its evidence came from legitimate sources.

B. Applicable Sentencing Guideline

Cozzi also argues that the district court should have used the civil rights guideline, rather than the aggravated assault guideline, to calculate the base offense level for sentencing purposes. A court sentencing a defendant guilty of violating 18 U.S.C. § 242 starts with § 2H1.1 of the sentencing guidelines. To calculate the correct base offense level, § 2H1.1 directs the court to apply the greatest of either – as applicable here – "the offense level from the offense guideline applicable to any underlying offense" or "10, if the offense involved (A) the use or threat of force against a person. . . ." Subsection (b) increases the base offense level by 6 levels "[i]f (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law. . . ." Application Note 1 of § 2H1.1 defines the "Offense guideline applicable to any underlying offense" as "the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1)."

The government urged the district court to use § 2A2.2 of the sentencing guidelines to calculate Cozzi's base offense level. Section 2A2.2 applies to "aggravated assault," which is defined as "a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; or (C) an intent to commit another felony." U.S.S.G. § 2A2.2, Application Note 1. The government argued that the conduct to which Cozzi pled guilty fell squarely within the definition of aggravated assault – namely, that Cozzi repeatedly struck Miles in the face with a sap – a dangerous weapon. The district court adopted the government's (and the pre-sentence report's) recommendation to use § 2A2.2 to calculate the base offense level.

The district court correctly applied the sentencing guidelines in calculating the appropriate sentencing range for Cozzi. The plain language of § 2H1.1 directs a court to apply the sentencing guideline applicable to the underlying offense (here, aggravated assault) if it would produce a greater base offense level than the base offense level premised solely on § 2H1.1. In this regard, § 2H1.1 "provides a floor, not a ceiling." *United States v. Byrne,* 435 F.3d 16, 27 (1st Cir. 2006). The sentencing guidelines recognize that in a situation, as here, where the defendant's conduct is more reprehensible than a civil rights violation that used a minor amount of force, the defendant's sentence should be on par with other defendants in

federal court who committed similar conduct under federal jurisdiction. *Id.*

Cozzi argues that the district court's use of § 2A2.2 was also improper because there was no underlying offense due to the fact that he was only charged with and pled guilty to one count, a civil rights violation. But the fact that there is only one count in his indictment does not eliminate Cozzi's conduct – he could only violate Miles's civil rights by *doing* something. It is that something that constitutes the underlying offense for purposes of § 2H1.1, regardless of how many substantive counts with which Cozzi was charged.

Cozzi also argues that because § 2H1.1 takes into account aggravating factors, there was no need to resort to § 2A2.2. Cozzi is correct that both § 2H1.1 and § 2A2.2 could account for his underlying conduct. However, the plain language of § 2H1.1 specifically directs the district court to use the guideline that produces the greatest base offense level. Section 2A2.2 produces a higher base offense level than § 2H1.1, so the district court was correct in using the former section as a starting point for calculating Cozzi's appropriate sentencing range.

Cozzi also argues that the aggravated assault guideline was not intended to cover civil rights violations because it does not mention 18 U.S.C. § 242 as an applicable code section and a civil rights violation is not like the other substantive crimes specifically mentioned. Of course, here the cross-reference comes

from the civil rights guideline and not the aggravated assault guideline. There are myriad ways to violate someone's civil rights, so as a matter of policy and economy it makes sense to have a single, flexible cross-reference in the civil rights guideline, rather than include a reference to the civil rights guideline in every conceivable section covering conduct that might also violate a victim's civil rights.

Cozzi's argument that using the aggravated assault guideline will produce sentencing disparities between him and other civil rights violators is without merit. Section 2H1.1 is in fact designed to ensure that there are no sentencing disparities between someone who commits aggravated assault and someone who commits aggravated assault that also violates the victim's civil rights. With a view toward the underlying conduct, there is no risk that referencing the aggravated assault guideline here will result in Cozzi receiving a sentence inappropriately disparate from other similarly situated defendants.

Finally, Cozzi argues that the aggravated assault guideline does not apply to him because he only pled guilty to a misdemeanor in state court and the guideline is expressly limited to "felonious assault." It is Cozzi's conduct, however, and not his state court plea that constitutes the underlying offense for purposes of § 2H1.1. *See* U.S.S.G. § 2H1.1, Application Note 1. In his federal plea agreement, Cozzi acknowledged that he hit Miles in the face with a dangerous weapon. He can make no serious argument that the *conduct* to which he pled guilty does not constitute felonious

assault, his bargain in state court notwithstanding. Accordingly, the district court did not err in finding that § 2A2.2 was applicable to Cozzi's underlying offense.

III. Conclusion

There was no improper use of Cozzi's immunized statements, and the district court correctly calculated the applicable guideline range. We therefore AFFIRM Cozzi's conviction and sentence.

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA **v.** William Cozzi	**JUDGMENT IN A CRIMINAL CASE** Case Number: 08 CR 276-1 USM Number: 40222-424 Terrence P. Gillespie Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) one (1) of the indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty. _____

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §242	Civil Rights Violation	8/2/2005	one (1)

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/11/2009
Date of Imposition of Judgment

/s/ Blanche M. Manning
Signature of Judge

Blanche M. Manning
Name of Judge

U.S. District Court Judge
Title of Judge

6/18/2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

40 months as to count one (1) of the indictment

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the

United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 8/6/2009.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

2 years. Drug tests shall not exceed more than 104 tests per year. Defendant shall complete 200 hours of community service. Defendant shall pay any unpaid financial penalty as a condition of supervised release. Monthly payments shall be

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

an amount equal to 10% of his net monthly income.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 2,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 2,100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Monthly payment shall be an amount equal to 10% of defendant's net monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Blanche M. Manning
Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CR 276
DATE	September 30, 2008
CASE TITLE	*United States v. William Cozzi*

DOCKET ENTRY TEXT

Defendant William Cozzi's motion [22-1] for dismissal of his indictment or suppression of evidence based upon (i) violation of his Fifth Amendment rights against self-incrimination, (ii) violation of the Full Faith and Credit Clause, and (iii) vindictive prosecution is denied.

■ [For further details see text below.] Docketing to mail notices.

00:00

STATEMENT

Defendant William Cozzi is a Chicago police officer who was caught on tape battering a hospital patient he had just shackled to a wheelchair. He previously pleaded guilty in state court to a single count of

misdemeanor battery, and has completed his sentence of 18 months' probation. He now faces a single count in federal court of using unreasonable force under color of law in violation of the U.S. Constitution and the laws of the United States stemming from the same incident. *See* 18 U.S.C. § 242.

Before the court is Cozzi's motion to suppress evidence or to dismiss the indictment. In support, he sets out the following contentions: (1) in deciding to prosecute him, the government improperly took into account statements he was forced to give to a police board reviewing whether he should be terminated, in violation of his Fifth Amendment right against self-incrimination; (2) prosecuting him in federal court for conduct that was the subject of a prior state court prosecution would violate the Full Faith and Credit Clause; and (3) the government's prosecution of him is vindictive.

The court will first briefly review the events that led to Cozzi's federal indictment before turning to his specific arguments in support of his motion. The battery to which Cozzi pleaded guilty occurred in the lobby of the emergency room at Norwegian American Hospital on August 2, 2005. The hospital notified the Chicago police department's Office of Professional Standards on August 25, 2005, and OPS began investigating on August 26, 2005. Within one month, OPS investigators interviewed the victim, numerous witnesses, and obtained physical evidence such as a recording of a 911 call reporting the incident as well as a video recording of the incident captured by a

security camera. OPS investigators also obtained statements from Cozzi himself during compelled interviews on September 14, 20 and 21, 2005. As a result of its investigation, on October 27, 2005, OPS released a summary report concluding that the allegations against Cozzi should be sustained and later recommended that Cozzi be terminated.

The Cook County State's Attorney's office also investigated the incident and, on December 28, 2005, a grand jury indicted Cozzi, charging him with three counts of aggravated battery, twelve counts of official misconduct, and two counts of misdemeanor battery. On May 10, 2007, Cozzi pleaded guilty to one count of misdemeanor battery; the remaining counts were nolle prossed.

In the meantime, the Chicago police superintendent filed charges against Cozzi with the Chicago Police Board on April 3, 2006, seeking to have Cozzi terminated. At a hearing on the charge on July 10, 2007, the police superintended called Cozzi as an adverse witness, compelling Cozzi to testify before the Police Board. On October 18, 2007, the Police Board found Cozzi guilty, but suspended Cozzi for two years in lieu of terminating him. (The two-year suspension was retroactive to April 4, 2006, the day after the superintendent filed the charge against Cozzi with the Police Board).

The incident involving Cozzi garnered media attention during the beginning of 2008 when (1) the *Chicago Sun-Times* reported that it had obtained a copy of the

security camera recording, (2) the handling of the case against Cozzi became an issue during the primary race for Cook County State's Attorney, and (3) incoming Chicago police superintendent Jodi Weis responded to reporters' questions about Cozzi. According to one newspaper report, Weis responded to the questions by stating that he would take a "hard, close look" at taking further action against Cozzi. A police spokesperson was quoted as stating that Weis had requested a briefing and would take a further look at the Cozzi matter.

Weis e-mailed an agent in the Chicago field office of the FBI about Cozzi, once on January 16, 2008, and again on January 21, 2008 – he sent the e-mails shortly before starting as police superintendent on February 1, 2008. According to the agent who received the e-mails, Weis asked whether the FBI had initiated an investigation of Cozzi for possible civil rights violations, noted that the former police superintendent had tried to fire Cozzi but failed, stated that Cozzi had "falsified his statement," and attached a video clip of the incident recorded by the Norwegian American Hospital security camera. The FBI had not previously looked into the Cozzi incident but, after receiving Weis' two e-mails, initiated an investigation. As part of the investigation, the FBI obtained the files compiled by the OPS and the Cook County State's Attorney's office. However, according to affidavits from the U.S. attorneys involved, before investigators reviewed the contents of Cozzi's files an assistant U.S. attorney uninvolved in the investigation redacted

Cozzi's statements from the files so that no one involved in the investigation had access to those statements.

With that background in mind, the court addresses Cozzi's specific arguments in favor of suppression of evidence or, in the alternative, dismissal of the indictment.

Fifth Amendment Right Against Self-Incrimination

Cozzi contends that federal authorities violated his Fifth Amendment right against self-incrimination by taking into account his compelled statements to the OPS and Police Board when deciding to prosecute him. Specifically, he argues that his indictment must be dismissed because "the focus of the federal investigation and the decision to bring federal charges was contaminated by Jody Weis' exposure to Cozzi's compelled statements and testimony" in violation of his right against self-incrimination. (R.45 at 2.) Alternatively, Cozzi asks the court to conduct a hearing to determine whether evidence the government presented to the federal grand jury or plans to present at trial was obtained as a result of Cozzi's compelled statements, necessitating either dismissal of the grand jury's indictment or the suppression of the tainted evidence from use at trial.

The Fifth Amendment to the U.S. Constitution prohibits the government from compelling a person to be a witness against himself. U.S. CONST. amend. V. In *Garrity v. New Jersey,* the U.S. Supreme Court

held that statements made by officers under threat of termination are entitled to immunity under the Fifth Amendment and, therefore, the government may not use those compelled statements or any evidence derived from them in any subsequent criminal proceeding. *See Garrity v. New Jersey,* 385 U.S. 493, 500 (1967).

Some courts limit not only the use of evidence obtained from compelled statements, but also limit non-evidentiary use, such as using the statements for "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *See United States v. McDaniel,* 482 F.2d 305, 311 (8th Cir. 1973). In *McDaniel,* a U.S. attorney read a defendant's self-incriminating statements twice shortly before obtaining an indictment of the defendant, unaware that the statements were immunized. *Id.* The defendant was convicted, but the appellate court vacated the conviction and dismissed the indictment because the government failed to show that the U.S. attorney "did not use [the statements] in some significant way short of introducing tainted evidence." *Id.*

Cozzi argues that under the rationale articulated in *McDaniel* and its progeny, his indictment should be dismissed because incoming Chicago police superintendent Jody Weis may have read Cozzi's statements before setting in motion the chain of events that led to his indictment. However, the Seventh

Circuit has explicitly rejected *McDaniel,* concluding that "the mere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information." *United States v. Velasco,* 953 F.2d 1467, 1474 (7th Cir. 1992).

Under Cozzi's theory, his federal indictment was tainted because of "Jody Weis' exposure to Cozzi's compelled statements and testimony." However, Weis was not part of the team within either the FBI or the U.S. attorney's office who investigated Cozzi's conduct or decided to pursue his prosecution. Moreover, the government contends that Cozzi's statements were redacted from the materials reviewed by the U.S. Attorneys prosecuting Cozzi. If true, Weis' alleged review of Cozzi's statements could not have had even a "tangential influence" on thought processes of the prosecutors. *See United States v. Bolton,* 977 F.2d 1196, 1199 (7th Cir. 1992) ("we doubt that even a 'tangential influence' is present here, since the two AUSAs who handled the second trial had, at most, indirect contact with the earlier investigation").

Nevertheless, Cozzi contends that he is entitled to an "evidentiary hearing in which he is afforded the right of cross-examination," presumably to elicit admissions from the U.S. attorneys involved in his case that his files were never redacted and they have, in fact, made non-evidentiary use of his compelled statements. (R.23 at 11.) However, as discussed above, even if prosecutors reviewed Cozzi's statement, he would still not be entitled to dismissal of his

indictment. *See Velasco,* 953 F.2d at 1474 (prosecutor's use of defendant's privileged statements to shape trial strategy is merely tangential and therefore not impermissible).

Cozzi argues that the Seventh Circuit's "tangential influence" line of cases have been derailed by the Supreme Court's decision in *United States v. Hubbell,* 530 U.S. 27 (2000). In *Hubbell,* the government served a subpoena *duces tecum* on the defendant calling for the production of documents that the subpoena described only in broad and general terms. *Id.* at 31. The defendant objected under the Fifth Amendment because the documents could be incriminating. In response to the objection, the prosecution obtained an order from the district court granting the defendant immunity "to the extent allowed by law." *Id.* (internal quotation marks and citation omitted). In compliance with the subpoena, the defendant produced 13,120 pages of materials, which indeed proved to be incriminating. *Id.* Based upon the documents received in response to the subpoena, prosecutors obtained a 10-count indictment against the defendant and, ultimately, a conviction. *Id.*

On appeal, the defendant argued that the prosecutor had improperly relied upon the documents he produced under a grant of immunity. The Supreme Court agreed:

> [Prosecutors obtained the documents] only after respondent asserted his constitutional privilege, received a grant of immunity, and

> – under the compulsion of the District Court's order – took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through respondent's truthful reply to the subpoena that the Government received the incriminating documents of which it made 'substantial use . . . in the investigation that led to the indictment.'"

Id. at 42-43 (citing the government's brief). Because the government conceded that it had no prior knowledge of the contents of the documents produced by the defendant or independent source for the information contained in the documents, the Supreme Court affirmed the appellate court's dismissal of the defendant's indictment. *Id.* at 45-46.

Although Cozzi argues that under *Hubbell* he is entitled to dismissal of his indictment, in fact the case is inapposite. In *Hubbell,* the government conceded that its prosecution of the defendant was premised *solely* on the documents produced by the defendant under a grant of immunity. *Id.* at 45. In contrast, Cozzi's compelled statements could not have been prosecutors' sole basis for seeking to indict him, especially given the abundance of evidence obtained *before* Cozzi's compelled statements, not the least of which is the security camera recording of the entire incident.

In summary, *Hubbell* addressed a prosecution based solely on evidence obtained under a grant of immunity, whereas the Seventh Circuit's decisions in *Velasco* and *Bolton* addressed prosecutions that were only tangentially influenced by immune testimony. Accordingly, *Hubbell* did not speak to the situation presented in *Velasco* and *Bolton* and therefore did not, as Cozzi suggests, eviscerate those cases.

Alternatively, Cozzi argues that the court must hold a hearing to determine whether prosecutors presented evidence obtained as a result of his compelled statements to the grand jury, or whether evidence prosecutors plan to present at trial was obtained as a result of his compelled statements. Cozzi's arguments are unavailing. First, the government produced transcripts of the grand jury proceeding to Cozzi, but Cozzi failed to identify any objectionable evidence in either his opening or reply brief. By failing to even identify any specific pieces of evidence that Cozzi contends should not have been presented to the grand jury, Cozzi has forfeited any argument he might have had about the issue. *See R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!,* 462 F.3d 690, 701 (7th Cir. 2006) (undeveloped, unsupported arguments are forfeited).

Second, it is premature at this early stage of litigation to address the admissibility of the government's evidence at trial. As the time for trial approaches, the court will enter a briefing schedule for motions in limine, at which time the parties may seek to exclude the use of evidence at trial.

Accordingly, because it is inconceivable that Cozzi's compelled statements had any more than a tangential influence on prosecutors (if that), he is not entitled to a *Garrity* hearing. Likewise, he is not entitled to discovery of the broad category of documents he has requested in order to prepare for such a hearing.

Full Faith and Credit Clause

Next, Cozzi argues that the U.S. Constitution bars the government from prosecuting him in federal court for conduct for which he has already been convicted in state court. But Cozzi's argument is not based upon the Double Jeopardy Clause of the Fifth Amendment, but rather the Full Faith and Credit Clause. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). Under Cozzi's theory, if the government proceeds with his federal prosecution, it will deny full faith and credit to "Illinois double jeopardy law." In other words, Cozzi contends, because Illinois' double jeopardy statute prohibits him from being tried again in state court, the federal government must defer from prosecuting him in order to give full faith and credit to that statute.

Cozzi's argument is an attempted end-around. In fact, under the "dual sovereignty doctrine," serial prosecutions and punishments by separate sovereigns for violations of their own laws is not prohibited under the Double Jeopardy Clause. *See United States v.*

Long, 324 F.3d 475, 478 (7th Cir. 2003). Cozzi acknowledges the "dual sovereignty doctrine," but dismisses it as a "legal fiction" that cannot stand in light of the Full Faith and Credit Clause. But his argument is one that has been long-rejected. *See Turley v. Wyrick*, 554 F.2d 840, 842 (8th Cir. 1977) (the Full Faith and Credit Clause does not prohibit the state and federal government from punishing a defendant for the same conduct but under unrelated statutes).

Moreover Cozzi, in his argument, assumes that the instant prosecution under 18 U.S.C. § 242 would be barred under Illinois' double jeopardy statute based upon his previous conviction for misdemeanor battery. However, Cozzi failed even to cite Illinois' double jeopardy statute (the cite is 720 Ill. Comp. Stat. 5/3-4), let alone develop any argument or articulate any theory why the instant prosecution would violate the Illinois statute. Accordingly, the argument is forfeited. *See R.J. Reynolds*, 462 F.3d at 701.

Vindictive Prosecution

Finally, Cozzi argues that his federal prosecution is a vindictive response to his successful appeal to the Police Board to keep his job. He requests a hearing so that he can establish evidence of vindictive prosecution.

The Due Process Clause prohibits prosecutors from pursuing a course of action to penalize a person for exercising his legal rights. *See United States v.*

Jarrett, 447 F.3d 520, 524 (7th Cir. 2006). However, a defendant faces a difficult burden to establish vindictive prosecution because a prosecutor's pretrial decisions are presumed valid. *See United States v. Falcon,* 347 F.3d 1000, 1004 (7th Cir. 2003). In light of that burden, a defendant is entitled to an evidentiary hearing on the issue of vindictive prosecution only if he can first identify "sufficient evidence to raise a reasonable doubt that the government acted properly." *Id.* To be sufficient, the evidence must establish "some form of prosecutorial animus, such as a personal stake in the outcome of the case or an attempt to seek self-vindication." *See United States v. Bullis,* 77 F.3d 1553, 1559 (7th Cir. 1996). Suspicious timing alone does not establish prosecutorial animus. *See Falcon,* 347 F.3d at 1005.

In support of his request for a hearing, Cozzi identifies the following evidence of prosecutorial animus:

> the government did not seek an indictment against Cozzi until after he exercised his State law labor rights and resisted separation from the Chicago Police Department. Indeed, the government sought and obtained an indictment the day before Cozzi [sic] suspension period ended!

(R.23 at 13.) Cozzi's choice of punctuation leaves no doubt that his evidence of prosecutorial animus consists entirely of evidence of suspicious timing. As a result, he cannot establish vindictive prosecution and is not entitled to a hearing. *See Falcon,* 347 F.3d at 1004-05.

CONCLUSION

For the reasons detailed above, Cozzi's motion to dismiss or, in the alternative, to suppress evidence [22-1] is denied.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Blanche M. Manning
Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CR 276
DATE	December 15, 2008
CASE TITLE	*United States v. William Cozzi*

DOCKET ENTRY TEXT

Defendant William Cozzi's motion for reconsideration [50-1] is granted in part and denied in part. The motion is granted to the extent that the court clarifies its September 30, 2008, order as follows: the court's decision that Cozzi forfeited any argument that he is entitled to a *Garrity* hearing to determine what occurred during grand jury proceedings applies only to the portions of the proceedings that involved witness testimony. However, after reviewing *in camera* transcripts of the remaining portions of the grand jury proceedings, the court has determined, for the reasons detailed below, that Cozzi is still not entitled to a *Garrity* hearing. Therefore his request that the court reconsider its decision against conducting a *Garrity* hearing is denied.

■ [For further details see text below.]	Docketing to mail notices.

00:00

STATEMENT

Defendant William Cozzi has filed a motion for reconsideration, asking the court to vacate or clarify its statement in an order dated September 30, 2008, that Cozzi forfeited any argument that the government improperly presented to grand jurors statements he was forced to make during police review board hearings. The basis for the court's forfeiture holding was that Cozzi failed to specify anything that he contended was improper, even though the government had produced transcripts of the grand jury proceedings to him. At the time, the court was under the impression that the government had produced transcripts of the entire grand jury proceeding. The government now acknowledges that it produced to Cozzi only the transcripts of witness testimony.

The court agrees that Cozzi has not forfeited any argument about those portions of the grand jury proceeding that were not produced to him, and clarifies its September 30, 2008, to that extent. However, the court stands by its ruling that Cozzi forfeited any argument about the portions of the grand jury proceeding involving witness testimony, transcripts of which the government produced to Cozzi.

As for the portions of the grand jury proceeding not produced to Cozzi, in an order dated November 25,

2008, the court directed the government to provide those transcripts to the court for *in camera* review. The government complied and the court has carefully reviewed those transcripts. The transcripts reflect a dialogue between grand jurors and prosecutors. At no point did anyone discuss the compelled statements of Cozzi. Moreover, at no point did prosecutors give grand jurors transcripts of the police review board hearing at which Cozzi made his compelled statements.

Based upon the court's careful *in camera* review, nothing in the transcripts would support any argument that Cozzi's compelled statements were improperly presented to grand jurors. The government has therefore met its burden of showing that the grand juror proceeding was not tainted by the improper use of Cozzi's compelled statements. Accordingly, Cozzi's request that the court reconsider its decision against conducting a *Garrity* hearing is denied.